



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristine, 24.september 2012
Ref. No.:RK299 /12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 88/11

Applicant

Kosova Protestant Evangelical Church

**Review of the Supreme Court Decision no. AP 306/2011
dated of 6 April 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

Applicant

1. The Applicant is the Kosovo Protestant Evangelical Church (hereafter, the “Applicant”), represented by the Pastor Femi Cakolli.

Challenged decision

2. The Applicant challenges the Supreme Court decision no. 306/2011, dated of 6 April 2011 and served on him on 7 June 2011.

Subject matter

3. The subject matter has to do with the interpretation of the Constitution in relation to the population census and on the legal, official and technical acts that have accompanied the 2011 census process.
4. The Applicant claims that asking the citizens to declare their religious affiliations in the 2011 census is a violation of Article 8 of the Constitution which provides that: *The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs.*

Legal Basis

5. The Referral is based on Article 113 (7) of the Constitution, Articles 46, 47, 48 and 49 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the "Law"), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the "Rules").

Proceedings before the Court

6. On 29 June 2011, the Applicant submitted the Referral to the Court.
7. On 17 August 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Gjyljeta Mushkolaj.
8. On 19 March 2012, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 31 January 2011, the Applicant complained to the Statistical Office of Kosovo (hereinafter, the SOK) in relation to the population census due to concerns that the Applicant's members were unable to freely express their religious affiliation in the census for the reason that they still live in Muslim or Catholic families and as a result these members "will not exist at all statistically". The Applicant has never received a response from the SOK.
10. On 22 February 2011 and 7 March 2011, the Applicant similarly complained to the Ombudsperson.
11. On 24 March 2011, the Ombudsperson responded to the Applicant, namely reminding that "*Article 113, Paragraph 7 of the Constitution, authorizes individuals to refer to the Constitutional Court violations by public authorities of their individual rights and freedoms guaranteed by the Constitution*". Furthermore, the Ombudsperson stated that "*the request to raise the issue with the Constitutional Court of Kosovo (...) is inadmissible, because you are utilizing legal remedies*".
12. On 31 March 2011, the Applicant filed a petition with the Supreme Court of Kosovo against the SOK on the grounds of administrative silence in respect of the Applicant's

complaint, violation of human rights and ignorance against a legal religious communion in Kosovo.

13. It seems that the Applicant filed that petition without having complied with Article 29 of the Law No 03-L-202 on Administrative Conflicts (hereafter, the "LAC"), meaning without having filed a second request with the SOK and waited for a period of 7 days, as legal conditions necessary to file a request with the Supreme Court.
14. Nevertheless, the Applicant requested the Supreme Court to restrain the SOK from publishing the census results from question 10 of the R3 form and sought comment in relation to the law on population census.
15. On 6 April 2011, the Supreme Court issued the decision in proceeding no. 306/2011 in relation to two petitions filed by the Applicant (No. 306/2011 and No. 315/2011) on the issue that the SOK has not reached a decision on its request.
16. The Supreme Court concluded that "the requests are premature" and thus rejected the requests. The Supreme Court reasoned that "in accordance with provision of Article 29, Par. 2 of the LAD, after the expiry of the period of 30 days, the requesting party was obliged to repeat its request and to request from the SOK to decide in relation to its request and to also await the expiry of another seven days from the submission of the repeated request. If after the passing of this deadline the SOK would not decide in relation to the request, the requesting party could submit a request for the commencement of an administrative dispute.
17. In sum, "since the requesting party has not addressed the Statistical Office of Kosovo with a repeated request, the Supreme Court, in accordance with the provision set forth by Article 34, Item 1, in relation to Article 29, Par. 2 of the LAD, concluded that the necessary legal conditions have not been met in this administrative issue for the commencement of an administrative dispute".
18. In addition, that decision of the Supreme Court stated as legal advice: "An appeal is permissible against this decision; it shall be submitted to the Supreme Court of Kosovo in the period of 15 days from the day of receipt of its copy".
19. The Applicant does not show that an appeal was filed against this decision in the assigned deadline.
20. On 10 June 2011, the Ombudsperson notified Pastor Femi Cakolli that the investigation was discontinued in relation to the complaint. The letter attached the "decision on the removal of the issue from the list" which summarised the undertaken steps in relation to the complaint and the reasoning of the decision.

Legal arguments presented by the Applicant

21. The Applicant alleges that the adoption by the SOK of the question 10 of the R3 2011 census, which required a response to "What is your religion?" followed by six options "(1) Islamic, (2) Orthodox, (3) Catholic, (4) Other (specify), (5) No religious belief or (6) I prefer not to answer" (...) is "a violation of the Constitution and the Law of religious freedoms and a violation of human rights as well as consciousness of the belief of citizens".
22. The Applicant claims that the SOK allegedly interfered on religious matters by asking their citizens to declare their religious affiliations in a census. The Applicant believes

this constitutes a violation of Article 8 of the Constitution which provides that: *The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs.*

23. The Applicant notes that the Law No. 03/L-237 on population census entered into force in November 2010 and the Census occurred between 1 and 15 April 2011. The Applicant is of the view that no public debate on the census and the law on population census. Moreover, the Applicant asserts that the census forms were printed prior to the announcement of the applicable law on the population census.
24. In summary, the Applicant claims the following:
 - 1) Firstly, the SOK violated Article 8 of the Constitution by requesting citizens to declare their religious affiliations;
 - 2) Secondly, the SOK violated Article 5.4 of the Law No.02/L-31 on religious freedoms, by not representing the Evangelist community in the R3 form;
 - 3) Thirdly, the SOK census takers are said to have improperly tampered with census forms by pre-emptively marking the religious affiliation response as "Islamic" without asking the individual the question beforehand;
 - 4) Fourthly, question 10 in the R3 form was not neutral; citizens should have been given the option of not choosing to respond to the question; and
 - 5) Fifthly, the conclusion of the Supreme Court is 'inadmissible and impracticable'.
25. In conclusion, the Applicant requests the Court to:
 - 1) Determine whether Article 8 of the Constitution was violated during the population census;
 - 2) Prevent the SOK from publishing the results from question 10 in the R3 form if it is deemed constitutionally invalid or in breach of Article 5.4 of the Law No.02/L-31 on religious freedoms; and
 - 3) Determine whether the human rights of Kosovo Protestants have been violated by the SOK in breach of Article 5.4 of the Law No.02/L-31 on religious freedoms, not including the Protestant faith as an option in the census.

Admissibility of the Referral

26. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.
27. Article 113. Section 1 and 7 of the Constitution establish the general legal frame required for admissibility. It provides:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties. (...)

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".

28. The precept of exhaustion of all legal remedies corresponds to the regular courts' obligation to remedy violations of fundamental rights themselves that may have occurred in the different stages of appeal. In fact, in accordance with Article 102 (3) of the Constitution, "courts shall adjudicate based on the Constitution and the law". Thus every court has the obligation to provide legal protection in the case of violations of the Constitution.
29. On the other hand, the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Thus, parties actually failing to take some procedural step in the regular courts are liable to have their case declared inadmissible, as it shall be understood as a waiver of the right to further object the violation.
30. The Applicant must therefore demonstrate that all legal remedies provided by the law have been exhausted. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (See *mutatis mutandis*, ECHR, *Selmouni vs. France*, no.25803/94 decision of 28 July 1999).
31. In sum, the Applicant must do everything that could reasonably be expected of him to exhaust domestic legal remedies (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-XII).
32. However, in relation to the present Referral, it appears that the Applicant has not exhausted all legal remedies.
33. In fact, on 6 April 2011, , the Supreme Court concluded (decision no.306/2011) that the petition was premature given that the Applicant has not complied with Article 29 of the Law 03-L-202 on Administrative Conflicts. ()
34. Article 29 of the LAC provides:
 - a. *If the court of appeals has not issued the decision within thirty (30) days or a shorter time-line determined with special provisions concerning the appeal of the party against the decision of the first instance court, whereas if it does not issue the decision further within seven (7) days with a repetitious request, the party may start the administrative conflict as if the complain has been refused.*
 - b. *As it is foreseen under paragraph 1 of this Article, the party may act also when according to his/her request, the decision by the court of first instance has not been issued, against which act the appeal cannot be made.*
 - c. *If the court of first instance, against which act the appeal can be made, has not issued any decision based on the request within sixty (60) days or a shorter foreseen time-line with special provisions, the party has the right to address by the request to the court of appeals. Against the decision of court of appeals, the party may start an administrative conflict, but also may, under the conditions in paragraph 1 of this Article, start it even if this body has not issued a decision.*
35. Moreover, in the period of 15 days, the Applicant did not appeal the Supreme Court's challenged decision no. AP 306/2011, dated of 6 April 2011, after having received the legal advice inserted in the same decision. He has not used this legal right, despite the

advice that the Applicant could address the Supreme Court of Kosovo with an appeal against its own Decision.

36. The Court also notes that a mere suspicion on the perspective of the matter is not sufficient to exclude an applicant from his obligations to appeal before the competent bodies (see *Whiteside v the United Kingdom*, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).
37. As a matter of fact, the rule on exhaustion does require that applications should be made to the appropriate [regular] courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints (...) should be made (...) in compliance with the formal requirements and time-limits laid down in domestic law (*ibid.*, pp. 25-27, paras. 71-72; see also the decision of the Commission of 11 January 1961 on the admissibility of application no. 788/60, *Austria v. Italy*, Yearbook of the Convention, Vol. 4, pp. 170-172); and, further, that any procedural means which might prevent a breach of the [Constitution] should have been used (see the *Barberà, Messegué and Jabardo* judgment of 6 December 1988, Series A no. 146, pp. 28-29, paras. 58-59, and also the Commission decision previously cited, pp. 166-170).
38. Therefore, in light with the findings of the Supreme Court, the present Referral should be considered as inadmissible as all legal remedies provided by law have not been exhausted.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 22 of the Law and Rule 36 (1) a) of the Rules, unanimously,

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- III. This Decision is effective immediately.

Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Prof. Dr. Enver Hasani